91-730

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DON R. HILTON,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY

Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

Did the circuit court abdicate its *Erie* obligations in upholding the trial court's summary judgment determination that, as a matter of law, Acquired Immune Deficiency Syndrome (AIDS) and its related conditions are not "handicaps" within the meaning of the Texas Commision on Human Rights Act?

If so, was the granting of the summary judgment improper?

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[1] The caption of this case in this Court contains the names of all parties in interest. Southwestern Bell Telephone is a subsidiary of Southwestern Bell Corporation.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of a panel decision of the United States Court of Appeals for the Fifth Circuit, which is reported at 936 F.2d 823 (5th Cir. 1991), and reprinted as Appendix "C." The Memorandum Opinion of the United States District Court for The Northern District of Texas, Dallas Division (Maloney, J.), is not reported. It is reprinted as Appendix "A." The trial court's Judgment is Appendix "B."

JURISDICTION

The decision of the Court of Appeals was entered on July 30, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

As applicable to this proceeding, the relevant portions of the Texas Commission on Human Rights Act of 1983 (TCHRA), Tex. Rev. Civ. Stat. Ann. art. 5221k, since amended, provides as follows:

> It is an unlawful employment practice for an employer:
>
> (1) to fail or refuse to hire or to discharge an individual or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, *handicap*, religion, sex, national origin, or age; or
>
> (2) to limit, segregate, or classify an employee or applicant for employment in a way that would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee because of race, color, *handicap*, religion, sex, national origin, or age.

TCHRA, § 5.01 (emphasis added).

The "specific rules of construction" section of the Act provides, insofar as here applicable:

> In Article 5, "because of handicap" or "on the basis of handicap" refers to discrimination because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job.

TCHRA, § 1.04(b).

The "general definitions" section of the Act provides:

> "Handicapped person" means a person who has a mental or physical handicap, including mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment

> that requires special ambulatory devices or services, as defined in Section 121.002(4), Human Resources Code, but does not include a person because he is addicted to any drug or illegal or federally controlled substance or because he is addicted to the use of alcohol.

TCHRA, § 2.01(7)(A).

> "Handicap" means a condition either mental or physical that includes mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services, as defined in Section 121.002(4), Human Resources Code, but does not include a condition of addiction to any drug or illegal or federally controlled substances or a condition of addiction to the use of alcohol.

TCHRA, § 2.01(7)(B).

STATEMENT OF THE CASE

Don Hilton filed this case in the District Court of Dallas County, Texas. Hilton claimed that Defendant Southwestern Bell refused to allow him to return to work, ultimately fired him, and otherwise discriminated against him because of his handicap (AIDS or AIDS-Related Complex). This, he maintained, is a violation of the Texas Commission on Human Rights Act of 1983 (TCHRA), Tex. Rev. Civ. Stat. Ann. art. 5221k. R.1 at 6-10.

Defendant timely removed the case to the United States District Court for the Northern District of Texas on the basis of diversity jurisdiction. R.1 at 1-5.

Thereafter, Hilton moved for preliminary injunctive relief. A trial on the injunction was held on August 4, 1989, and the matter was fully briefed. On April 2, 1990, before the trial court decided Hilton's request for injunctive relief, Southwestern Bell filed its Motion for Summary Judgment, R.1 at 312, to which plaintiff responded. R.6.

The trial court granted the motion, holding "as a matter of law" that AIDS and its related illnesses are not "handicaps" within the meaning of the Texas Act. App. "A" at 6a. The basis for this conclusion was the court's view that conditions such as AIDS are not generally perceived as "severely limiting persons in performing work-related functions in general." *Id.* The court then dismissed plaintiff's request for injunctive relief as moot. R.2 at 431-38. Judgment was entered the same date. R.2 at 439. Hilton appealed. R.2 at 440.

Hilton was an 11-year employee of Defendant Southwestern Bell. He was last actively employed in the position of Drafting Clerk, a sedentary job. Tr. at 14-15, 30. Hilton has AIDS or AIDS. Related Complex — a terminal illness — which was diagnosed in 1985. Tr. at 16. Idiopathic thrombocytopenic purpura (ITP) has been the major complicating factor of Hilton's medical history. Tr. at 53, 130, 136-37. ITP is a dangerous medical condition characterized by a low platelet count which may cause spontaneous bleeding. Tr. at 53, 98, 101.

As a result of this complication, and others, plaintiff was placed on defendant's short-term disability plan in November, 1986. This plan gives an employee the right to return to his job when his condition permits at any time prior to the expiration of a 52-week period. Tr. at 144-45. Because of a significantly positive change in his condition, Hilton was released by his physician to return to work as a Drafting Clerk on or about October 5, 1987. *See* Plaintiff's Exhibit 1; Tr. at 17-18, 54, 57-59. Before he could resume employment, however, Southwestern Bell forced him to see a doctor of its selection, and despite the fact that no job-related physical or mental impediments to his return existed, Tr. at 19, 39, the defendant, on or about October 26, 1987, and continually thereafter, refused him permission to return. It claimed that to do so, in light of his ITP, would subject him to an unacceptable risk of harm. This "risk," however, was not a risk greater than that posed by Hilton's daily non-work activities. Tr. at 39, 131-32. In fact, the duties required by the Drafting Clerk job would subject him to lesser risk than those to which he is exposed when not working. Tr. at 143-44. In other

words, the job duties plaintiff would be required to perform would not enhance, but would lessen, the general risk to him associated with ITP. *Id.* Moreover, Hilton's return to his job would pose no real risk to those around him. Tr. at 60, 137-38; 936 F.2d at 826.

On or about November 5 or 6, 1987, Southwestern Bell terminated Hilton's employment, thereby forcing him into its long-term disability program. Tr. at 19. At the time he was fired, plaintiff was fully capable of reasonably performing his job duties despite his condition, and he remains capable of doing so today. Tr. at 19-20, 57-59, 121.[2]

The reason for plaintiff's termination was the low platelet count associated with his ITP. Tr. 130, 136-37; 936 F.2d at 826. Defendant's corporate medical adviser, Dr. James T. Wheeler, acknowledges that this is the "exclusive" reason for the action taken against Hilton, Tr. at 130, 137, and that as a matter of course, defendant disqualifies all individuals suffering from low platelet counts. Tr. at 143, 150.

Significantly, Dr. Wheeler also acknowledges that *plaintiff's medical condition is one which is generally perceived as severely limiting one's work-related functions*. Tr. 142. The totality of the evidence, both plaintiff's and defendant's, supports this view, and the view that Hilton's condition is terminal and dangerous. *See, e.g.*, Tr. at 57-58, 64-65, 110, 131. Nevertheless, plaintiff's illness, which restricts his ability to perform many physical functions, Tr. at 39, 57-58, 64, *does not* affect his ability to reasonably perform the duties required by the sedentary job of a Drafting Clerk. Tr. at 39, 57-58, 60, 71, 131-32.

REASONS FOR GRANTING THE WRIT

The substantive issue decided below is, of course, an important one to the viability and effective enforcement of the Texas Act for

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[2] Hilton's termination has resulted in an approximate 50 per cent reduction in his income, and it has deprived him of the opportunity to acquire medical care which may prolong his life. Tr. at 20-21, 25-26. The firing has caused him other substantial psychological and physical losses. Tr. at 21, 25-26. In addition, with his termination he has lost the ability to obtain increased life insurance. Tr. at 34, 46.

the benefit of Hilton and countless others who suffer illnesses of equal or lesser severity. The panel opinion manifests a disquieting infidelity to the Texas law it was bound to follow under the *Erie* doctrine. In reaching its erroneous decision, the Fifth Circuit has departed from the express language of the Act, from Texas Supreme Court precedent, and from opinions of the Texas Attorney General and the Texas Commission on Human Rights. In effect, the court's ruling leaves many — those with epilepsy, heart disease and innumerable other conditions — without protection as a result of the niggling and twisted interpretation provided.

I. PLAINTIFF'S CONDITION CONSTITUTES A "HANDICAP" UNDER THE TEXAS COMMISSION ON HUMAN RIGHTS ACT.

The circuit court erred in holding that Hilton's condition (AIDS-related ITP) is not a "handicap" within the meaning of the Texas Commission on Human Rights Act (TCHRA), Tex. Rev. Civ. Stat. Ann. art. 5221k.

Severe chronic illnesses and contagious diseases, like AIDS and ARC, are "handicaps" within the express provisions of the Act. Moreover, the definition of "handicap" as formulated by the Texas Supreme Court leaves little doubt that a condition like Hilton's constitutes a "handicap." Finally, both the Texas Attorney General and the Texas Commission on Human Rights — the state agency charged with interpreting and enforcing the Act — have opined that such diseases qualify as "handicaps."

A.

To discern the profound nature of the error below, it is important to compare the basis of the district court's grant of summary judgment to that of the circuit court's affirmance. In granting summary judgment for Southwestern Bell, the trial court held as follows:

> The Court, as a matter of law, concludes that *neither AIDS/ARC nor ITP are generally perceived as severely limiting persons in performing work-related functions in*

> *general*. Rather, the Court concludes that AIDS/ARC and ITP are medical conditions which may afflict certain persons, but that these illnesses by themselves do not constitute a handicap.

App. "A" at 6a (emphasis added).

In contrast, the Fifth Circuit noted that the parties agreed that Hilton's condition was, in fact, one which generally *is* perceived as severely limiting one's work-related functions. 936 F.2d at 829. There was likewise no dispute that Hilton was fired because of his condition: "[T]he parties agree that ... Hilton's termination was the direct result of his low platelet count associated with his ITP. *Id.* at 826.

Given this factual background of intentional discrimination based on Hilton's physical condition, the circuit court rowed around controlling and definitive Texas authority to reach a pre-determined destination. To do so, it invoked the rule of *ejusdem generis* to hold that the condition at issue does not fall within the ambit of the Texas law. In this regard, the court focused almost exclusively upon the "general definitions" section of TCHRA, while discounting, if not effectively ignoring the *specific* rules of construction set forth in Section 1.04(b) of the Act. That section expressly and clearly sets forth or significantly bears upon the definition of "handicap."

> "[B]ecause of handicap" or "on the basis of handicap" refers to discrimination because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job.

The primary stated basis for the circuit court's refusal to follow this specific rule of construction is an imagined fear that the provision is "too tough," that it would create a form of per se liability. 936 F.2d at 829-30. To the contrary, the language and the meaning of the statute is simple: one may not be discriminated against on account of conditions which do not impair reasonable performance.

In reaching its awkward conclusion, the court cites *Chevron Corp. v. Redmon*, 745 S.W.2d 314 (Tex. 1987). *Redmon*, however, provides no support for the appellate court's position. In fact, it is but another piece of Texas authority which the circuit court discards to reach its result, for *Redmon* also defines the term "handicapped person" under the statute at issue.

In its struggle to define "handicap" under TCHRA, the Texas Supreme Court in *Redmon* reviewed the language and the legislative history of the instant and prior law. It also reviewed pertinent authority from other jurisdictions. Having done so, the court concluded:

> The [Illinois] court held that the test for whether a person is "handicapped" is whether the disability is one which is generally perceived as one which severely limits him in performing work-related functions.
>
> We believe the same reasoning applies in this case. While under article 5221k, a person may not sue if his handicap impairs his ability to do *that* particular job, in order for a disability to be considered a handicap in the first place it must be one which is generally perceived as severely limiting him in performing work-related functions in general.

745 S.W.2d at 318 (emphasis in original). The reason Redmon's claim was rejected was because her condition did not meet the "severity" test established by the court, not because her condition in the first instance fell outside the ambit of the Act. In this case, however, it is effectively conceded that Hilton meets the severity test. Even Southwestern Bell's medical adviser and employee, Dr. James Wheeler, acknowledges this:

> Q. ... Well, I'm just asking you whether Mr. Hilton's condition is one which, in your opinion, is generally perceived as severely limiting one's work related functions?
>
> A. Yes, I would perceive that it is.

Tr. at 142. *See also* Tr. at 141. Indeed, the totality of the summary judgment evidence offered by both parties establishes beyond doubt that Hilton's condition is such. While Hilton's illness does not prevent the reasonable performance of duties associated with the Drafting Clerk job, Tr. at 19, 20, 39, 43 (testimony of Hilton); 57, 59, 60, 70-71 (testimony of Dr. Pulse); 131, 132 (testimony of Dr. Wheeler), it does seriously impair or preclude his performance of other tasks, work-related and otherwise.

The Fifth Circuit ignored the clear language of the Texas statute. It likewise ignored the definition of "handicap" and "handicapped person" established by the Texas Supreme Court.

B.

Furthermore, despite the lower courts' adverse pronouncements in this *Erie*-governed case, it is the prevailing view in Texas — apart from the statute's language and the clear holding of *Redmon* — that severe chronic illnesses and contagious diseases, including AIDS and its related complexes, constitute "handicaps" within the meaning of the Texas Act. *See* Tex. Atty. Gen. Op. No. JM-648 (Mar. 19, 1987). R.3 at Exhibit A, pp. 5-6.

Opinion No. JM-648 is instructive. It was requested by the Executive Director of the Texas Commission on Human Rights, the state agency charged with administering the Act in question here, and it specifically refers to AIDS in the context of contagious diseases. In pertinent part, the opinion states as follows:

> You request clarification of the mental or physical handicaps which provide standing to a person to file a complaint alleging employment discrimination under the Texas Commission on Human Rights Act ...
>
> * * *
>
> For purposes of determining standing to file a complaint alleging employment discrimination ... *the commission has not interpreted a handicap to be limited to the mental*

and physical conditions expressly enumerated in section 2.01(7) of the act. The commission interprets a mental or physical handicapping condition as a permanent condition which may or may not be controlled by medication or a corrective device and which may or may not impair a person's ability to perform a particular job. *Under the commission's interpretation, a number of mental and physical conditions, including chronic illnesses and diseases, may be covered under the act for purposes of a person having standing to file a complaint. We agree with the commission's interpretation.*

* * *

SUMMARY

For purposes of standing to file a complaint alleging employment discrimination under the Commission on Human Rights Act ... *a handicap is not limited to the mental and physical conditions expressly enumerated in section 2.01(7) of the act and may include chronic illnesses and contagious diseases.*

Id. at 1, 2, 6 (emphasis added).[3]

Application of the rule of *ejusdem generis* in the restrictive manner applied is at odds with the stated purpose of TCHRA, which is "to secure for persons within the state freedom from discrimination in certain transactions concerning employment, and thereby to protect their interest in personal dignity ..." TCHRA, § 1.02(2). It is further at odds with Section 1.04(b), as noted, as well as with the clear holdings in *Chevron Corp. v. Redmon, supra,* and the opinions of the Texas Attorney General and the Human Rights Commission.

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[3]The appeals court states flatly that *Chevron Corp. v. Redmon* "obliterated the premises upon which the Attorney General's opinion was based." 936 F.2d at 830. The court cites no reason why it arrived at such a conclusion and Hilton discerns none.

Also at odds with these decisions is the circuit court's niggling distinction between "physiological" and "pathological" conditions. 936 F.2d at 828-29. A reading of the Act fails to support such a distinction. This is particularly true when, on the one hand, the Act expressly includes mental conditions and, on the other, excludes coverage for drug and alcohol addiction, a portion of Section 2.07 left unquoted by the court. In a stroke of the pen, the circuit court writes off protection for thousands whose conditions have yet to become "physiological" and perhaps never will because of their spontaneous nature (ITP, heart attack, epileptic seizure, and the like). The pernicious effect of the decision here is particularly startling in light of solid Texas precedent that demands that technical, narrow construction "should not" be given to remedial statutes such as TCHRA. *See, e.g., City of Mason v. West Texas Utilities*, 237 S.W.2d 273, 280 (Tex. 1951). This precedent is at war with the "properly strict application of the *ejusdem generis* rule" which the circuit court unjustifiably imposes on THCRA. 936 F.2d at 828. When a federal court sitting in diversity has a "real concern" about the effect of state law, it is nevertheless duty-bound to follow that law. *See, e.g., Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991).

By ignoring the Attorney General's opinion and the Commission's position, along with the holding of *Redmon* and the language and purpose of TCHRA itself, the lower courts manifested extreme infidelity to their obligation under *Erie Railway Co. v. Tompkins*, 304 U.S. 64 (1938), to defer to expressions of the substantive law of Texas.

The Fifth Circuit should be reversed.

II. SUMMARY JUDGMENT FOR SOUTHWESTERN BELL WAS IMPROPER IN THIS CASE.

Despite the contrary conclusion of the appeals court, whether one is "handicapped" is a fact question under Texas law, particularly in the circumstances presented here. As the Texas Supreme Court noted in *Chevron Corp. v. Redmon, supra:*

> The question of whether a person is "handicapped" is generally a question of fact for the fact finder.

745 S.W.2d at 318. This holding was echoed in *Finney v. Baylor Medical Center Grapevine*, 792 S.W.2d 859 (Tex. App. — Fort Worth 1990, writ denied), where it was urged that manic depression constituted a "handicap" under TCHRA. Defendant contended that, as a matter of law, it did not. The trial court granted summary judgment to defendant on that basis. In reversing the trial court, the appeals court noted that the "categorization of Finney's condition is a fact issue ..." *Id.* at 860. The court further noted:

> Although the Texas Supreme Court determined that minor visual impairment was not a "handicap" as a matter of law, it also held that "[t]he question of whether a person is 'handicapped' is generally a question of fact for the fact finder." *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 318 (Tex. 1987).
>
> * * *
>
> The language of article 5221k, coupled with the *Chevron* decision, leads us to conclude that the issue of whether Finney is "handicapped" under 5221k is one of material fact which must be resolved by the fact finder. The conflicts in Finney's deposition testimony and her subsequent affidavit indicate that a fact issue exists as to whether the manic depression from which she suffers is a "handicap" under the statute.

The fact question involves a determination of whether plantiff's disability is "one which is generally perceived as severely limiting him in performing work-related functions in general." *Chevron Corp. v. Redmon, supra*, 745 S.W.2d at 318. The evidence in this case establishes without question that plantiff's illness falls squarely within this definition. Indeed, it is virtually, if not wholly conceded. *See* Part I(A), *supra*. Furthermore, the evidence shows that Hilton meets the second prong of the Texas test: that despite his handicap, he is able to reasonably — in fact, completely — perform the sedentary duties of a Drafting Clerk. *Id.*; TCHRA, § 1.04(b).

If the evidence does not conclusively establish these points in plaintiff's favor, at a minimum that evidence raises genuine issues of material fact as to whether Hilton is "handicapped" under the Act. Accordingly, the summary disposition was error.

Because the lower courts decided the dispositive issue of "handicap" by summary judgment, it is likewise appropriate to consider the controlling provisions of Fed. R. Civ. P. 56(c), which permits entry of judgment for the movant only when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56 is designed to provide a procedural avenue for the quick disposition of *meritless* claims and defenses. *See generally* Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984). Its use is proper, if at all, only where a moving party has satisfied the court that there exists "no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). Doubts as to the existence of genuine issues should be resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *Page v. Delaune*, 837 F.2d 233, 2 IER Cases 1873, 1877 (5th Cir. 1988). Summary disposition should not be allowed unless it is clear that a trial on the issue is unnecessary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). If the moving party appears to meet its burden to establish the absence of evidence to support the nonmovant's claim, only then must the nonmovant come forth and make a showing which indicates the existence of a fact issue. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323. As further pointed out by Justice White in his concurrence in *Celotex*, "It is not enough to move for summary

judgment without supporting the motion in any way *or with a conclusory assertion that the plaintiff has no evidence to prove his case.*" *Id.* at 328 (White, J., concurring) (emphasis added).

In reviewing the decisions below, the Court is to apply the same legal standard as that which governs the trial court's action, *i.e.*, whether a genuine issue of material fact exists. *See Weyant v. Acceptance Ins. Co.*, 917 F.2d 209, 212 (5th Cir. 1990). As the Fifth Circuit recently noted, "[t]he test is identical to that used for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law'." *Chiari v. City of League City*, 920 F.2d 311, 314-15 (5th Cir. 1991), *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). In reviewing the lower court's decision, however, it is incumbent on this Court to assess the evidence in the light most favorable to Hilton, the nonmovant. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192 (5th Cir. 1988). If a question of law becomes controlling, the trial court's decision is subject to full review. *Brooks, Tarlton, Gilbert, Douglas & Kessler v. U.S. Fire Ins. Co.*, 832 F.2d 1358 (5th Cir. 1987).

First and foremost, the issue of "handicap" is one of fact under Texas law — at least in the circumstances presented here. The summary judgment proof is clear that if plaintiff has not conclusively established that he is "handicapped," then at the very least, sufficient genuine issues of material fact have been raised to prevent summary disposition in Southwestern Bell's favor. The lower court should be reversed.

CONCLUSION

The circuit court's bold and extreme departure from Texas' substantive law, and the consequences of that departure, require that a writ be granted and this case set for argument.

Respectfully submitted,

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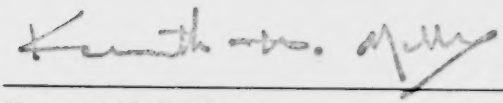

Kenneth H. Molberg

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing have been forwarded to opposing counsel, Mr. William Brown, One Bell Plaza, Room 2900, 208 S. Akard, Dallas, Texas 75265-5521, on 10-28, 1991, pursuant to Supreme Court Rule 29.

Kenneth H. Molberg

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTIRCT OF TEXAS
DALLAS DIVISION

DON R. HILTON,)
Plaintiff,)

v.

SOUTHWESTERN BELL)
TELEPHONE COMPANY,)
Defendant.) **CA 3-88-2901-T**

Filed October 22, 1990

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

On April 2, 1990, Defendant filed its Motion for Summary Judgment. Defendant filed its Supplement to its Motion for Summary Judgment on April 13, 1990. Plaintiff filed his response on June 1, 1990.

Background

Plaintiff filed an original petition in the 191st Judicial District Court, Dallas County, on October 10,1988. Plaintiff alleges that Defendant discriminated against him in violation of the Texas Commission on Human Rights Act of 1983, Tex. Rev. Civ. Stat. Ann. art. 5221(k) ("TCHRA"), which prohibits discrimination in employment because of a handicap. Plaintiff alleges that he is handicapped because he suffers from Acquired Immune Deficiency Syndrome ("AIDS") and AIDS-Related Complex ("ARC"). Plaintiff also states a claim for wrongful discharge, alleging that Defendant fired him without just cause and in violation of its duty of good faith and fair dealing. On November 21, 1988, Defendant, a citizen of the state

of Missouri, removed this action based upon the Court's diversity jurisdiction, 28 U.S.C. § 1332.[1]

The facts in this action are generally undisputed. Plaintiff was hired by Defendant on December 21, 1976. In May 1985, Plaintiff tested positive for the AIDS-HIV virus and in April 1986 was reassigned to a sedentary position as a drafting clerk in the Engineering Design section of Defendant's Network Distribution Services department. In September 1986, the cause of Plaintiff's disability was diagnosed by Plaintiff's treating physician, Dr. Terry Pulse, as that of AIDS/ARC with idiopathic thrombocytopenia purpura ("ITP"). ITP is a condition in which the patient has a low blood platelet count, which in turn may cause spontaneous bleeding. On or about October 31, 1986, Plaintiff was absent from work for a medical condition related to AIDS. Plaintiff did not return to work for the next six days and on November 3, 1986 Dr. Pulse advised Plaintiff to go out on disability. Beginning November 7, 1986 Plaintiff began receiving disability benefits pursuant to Defendant's Sickness and Accident Disability Benefit Plan. The plan provided up to 52 weeks of disability benefits for any employee having at least six months service. At the end of 52 weeks, if an employee had not returned to work, the employee could apply for benefits under Defendant's Long Term Disability Benefits Plan. If an employee's disability is not removed within the 52 weeks, the employee is terminated from Defendant's employ and removed from the active payroll.

On December 3, 1986, Dr. Pulse advised Defendant that Plaintiff suffered from AIDS/ARC with ITP and that Plaintiff was totally disabled from sedentary work due to a platlet count of 14,000/mm^3 which Pulse characterized as life-threatening.[2] From November 3, 1986 until September 23, 1987, Dr. Pulse submitted at least twelve separate documents substantiating Plaintiff's total disability and in-

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[1]As this case is before the Court on the basis of diversity jurisdiction, the Court shall apply the substantive law of the forum state, Texas. *Erie Railway Company v. Tompkins*, 304 U.S. 64 (1938).

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[2]The evidence adduced at the preliminary injunction indicated that the average blood platlet count is between 140,000 and 400,000/mm^3.

capacity to return to work. As Plaintiff had been on disability for more than seven months, Defendant directed that he submit to a medical examination to obtain a second opinion. On August 18, 1987, Plaintiff was seen by Dr. Brady Allen, who reported to Defendant that Plaintiff was totally disabled on the basis of this low blood platelet count, ITP. Defendant's medical advisor, Dr. James Wheeler, concurred with Brady's examination and advised the employees benefits committee of Defendant that Plaintiff was disabled.

Thereafter, on September 30, 1987, Dr. Pulse recommended that Plaintiff be allowed to return to light sedentary work on October 5, 1987, although his ITP condition had not changed; Pulse reported that Plaintiff's blood platlet count was 20,000/mm^3. Prior to allowing Plaintiff to return to work after being out on disability for more than ten months, Defendant directed Plaintiff to submit to an independent medical consultation. On October 2, 1987, Plaintiff was examined by an independent medical consultant, Dr. James R. Farris, who found that Plaintiff had a blood platelet count of 6,000/mm^3. Dr. Farris's report indicated that due to the severity of Plaintiff's thrombocytopenia (ITP), even sedentary job duties were implausible and Plaintiff could not return to work even under restricted hours. Dr. Wheeler concurred with Dr. Farris's examination and advised the benefits committee that Plaintiff was still disabled and should not be allowed to return to work.

Thereafter, Defendant refused to allow Plaintiff to return to work as Defendant had found that Plaintiff was still disabled. After being notified that he was not to be allowed to return to work, Plaintiff applied for and was approved for long term disability benefits which he began receiving on November 6, 1987 and he was consequently terminated from Defendant's active payroll.

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[5]The record reveals that, at the time of the injunction hearing on August 4, 1989, Southwestern had 18 employees in the Dallas division who had been diagnosed as having AIDS, and that 11 of those 18 were still working.

On April 22, 1988, Plaintiff filed his charge of discrimination with the Equal Employment Opportunity Commission, alleging that he had been discriminated against because he had AIDS/ARC. Plaintiff subsequently filed this action and on June 8, 1989, well after this action was commenced, Plaintiff filed his application for preliminary injunction. The Court held a hearing on Plaintiff's application on August 4, 1989, at which the Court heard evidence from Plaintiff, his physician, and Defendant.

Defendant now moves the Court for entry of summary judgment in its favor, contending that no genuine issues of material fact exist and that it is entitled to summary judgment as a matter of law. Rule 56, Fed. R. Civ. P. Defendant contends that Plaintiff failed to timely file an administrative complaint as required by TCHRA; that Plaintiff failed to establish that he is a member of a protected class under TCHRA; that Defendant has articulated a legitimate, non-discriminatory reason for failing to allow Plaintiff to return to work, which reason Plaintiff has failed to rebut; that Plaintiff's termination was pursuant to a bona fide employee benefit plan; and, that Plaintiff's wrongful discharge claim fails to state a claim and is preempted by federal law.

Analysis

A. Statute of limitations

Defendant contends that Plaintiff has failed to timely file an administrative complaint with the Texas Commission on Human Rights. Defendant contends that, similar to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, exhaustion of administrative remedies is necessary before filing an action under TCHRA. *Schroeder v. Texas Iron Works, Inc.*, 769 S.W.2d 625 (Tex. App.--Corpus Christi 1989, writ granted). Pursuant to section 6.01 of TCHRA, an administrative complaint must be filed within 180 days after the alleged unlawful employment practice occurred.

In the instant action, it is undisputed that Plaintiff filed his administrative complaint with the Texas Commission on Human Rights on April 22, 1988. However, Defendant states that Plaintiff was notified

by phone on October 16, 1987 that he was not to be allowed to return to work. As 180 days from October 16 was April 13, 1988, Defendant contends Plaintiff's complaint is time-barred. Specifically, Defendant contends that because the effect of refusing to allow Plaintiff to return to work was that he would be placed on long term disability and consequently terminated, that the time began to run on October 16, 1987.

The Court, having considered Defendant's arguments, finds that Plaintiff's claim under TCHRA is not time-barred. The Court notes that it was not until October 26, 1987 that Plaintiff was given formal written notice from Defendant's benefits committee that he was not to be allowed to return to work. The Court concludes that October 26th is the date when Defendant's decision was communicated to Plaintiff. Moreover, the Court notes that Plaintiff was not effectively terminated from his employment until November 6, 1987, and should the Court consider that as the date at which Plaintiff's time began to run, Plaintiff's complaint with the Texas Commission would be considered timely. Moreover, Plaintiff contests the content and extent of the October 16, 1987 phone conversation; raising a genuine issue of material fact which precludes summary judgment in favor of Defendant.

B. Handicap Under TCHRA

Defendant argues that Plaintiff has failed to allege a handicap within TCHRA. In support of this position, Defendant cites the Texas Supreme Court case of *Chevron Corporation v. Redmon*, 745 S.W.2d 314 (Tex. 1987), in which the court held that, under article 5221k for a disability to be considered a handicap, the disability must be generally perceived as severely limiting a person performing work-related functions in general. *Id.* at 318. Plaintiff contends that he has shown that he is handicapped as defined by TCHRA.

The Court, having reviewed the pleadings and the evidence adduced at the preliminary injunction, is unclear whether Plaintiff considers AIDS/ARC as his alleged handicap or his ITP condition as the handicap. Regardless, the Court, applying the standard set forth in *Chevron*, is of the opinion that Plaintiff has failed to allege

a handicap under TCHRA. The Court, as a matter of law, concludes that neither AIDS/ARC nor ITP are generally perceived as severely limiting persons in performing work-related functions in general. Rather, the Court concludes that AIDS/ARC and ITP are medical conditions which may afflict certain persons, but that these illnesses by themselves do not constitute a handicap.

C. Wrongful Discharge

Defendant contends that Plaintiff's state law claim for wrongful discharge fails to state a claim upon which relief can be granted under Texas law. Moreover, Defendant contends that the wrongful discharge claim is preempted by federal law because Plaintiff was covered by a collective bargaining agreement with the Communications Workers of America and, thus, Plaintiff's remedy lies with the collective bargaining agreement. 29 U.S.C. § 185.

Plaintiff's response indicates that Plaintiff agrees with Defendant's position that the claim is preempted by federal law. Therefore, the Court is of the opinion that summary judgment with respect to Plaintiff's claim for wrongful discharge is appropriate and that the claim should be dismissed.

Conclusion

The Court, having considered Defendant's motion for summary judgment and the evidence submitted therein, Plaintiff's response and the evidence received at the preliminary injunction hearing on August 4, 1989, is of the opinion that the motion for summary judgment should be granted. As the Court is granting Defendant's motion for summary judgment, the Court is also of the opinion that Plaintiff's application for preliminary injunction should be denied as moot.

It is therefore **ORDERED** that Defendant's motion for summary judgment is granted and that Plaintiff's original petition is dismissed with prejudice.

It is **FURTHER ORDERED** that Plaintiff's application for preliminary injunction is denied as moot.

Signed this 22nd day of October, 1990.

ROBERT B. MALONEY
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTIRCT OF TEXAS
DALLAS DIVISION

DON R. HILTON,)
Plaintiff,)

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,)
Defendant.) **CA 3-88-2901-T**

Filed October 22, 1990

JUDGMENT

This action came on for consideration before the Court on Defendant's Motion for Summary Judgment, Honorable Robert B. Maloney, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is **ORDERED** and **ADJUDGED** that Plaintiff Don R. Hilton take nothing of Defendant Southwestern Bell Telephone Company and that Plaintiff's original petition is dismissed with prejudice.

Signed this 22nd day of October, 1990.

ROBERT B. MALONEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

**Don R. HILTON, Plaintiff-Appellant
Cross-Appellee,**

v.

**SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant-Appellee
Cross-Appellant.**

No. 90-7006

Summary Calendar.

**United States Court of Appeals,
Fifth Circuit.**

July 30, 1991.

Draftsman who had been prevented from returning to work because he was afflicted with Acquired Immune Deficiency Syndrome (AIDS) and had dangerously low blood platelet count brought suit against employer for handicap discrimination under Texas Commission on Human Rights Act. The United States District Court for the Northern District of Texas, Robert B. Maloney, J., granted employer's motion for summary judgment, and draftsman appealed. The Court of Appeals held that: (1) employee's AIDS and his resulting low blood platelet count were not "handicap," within meaning of section of Texas Commission on Human Rights Act prohibiting employers from discriminating against employees on basis of mental or physical handicap, and (2) even assuming that employee's condition could be regarded as "handicap," it was handicap that impaired employee's "ability to reasonably perform a job," such that employer could not be held liable under Human Rights Act for discriminating against employee based on condition.

Affirmed.

1. Federal Courts 776

Court of Appeals reviews grant of summary judgment de novo, using same criteria as those that were used by district court in first instance.

2. Civil Rights 175

Employee's Acquired Immune Definciency Syndrome (AIDS) and his resulting low blood platelet count were not "handicap," within meaning of section of Texas Commission on Human Rights Act prohibiting employers from discriminating against employees on basis of mental or physical handicap; employee's pathological condition had resulted in no physiological impairment and had not affected his senses or his ability to walk, use his hands and arms, sit or stand. Vernon's Ann.Texas Civ.St. art. 5221k, § 2.01(7)(A, B).

3. Statutes 194

When statutory language at issue consists of general words following an enumeration of persons or things, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of same general kind or class as those specifically mentioned.

4. Civil Rights 173

Term "handicap" as used in section of Texas Commission on Human Rights Act prohibiting employers from discriminating against employees on basis of mental or physical handicap, refers to physiological health impairment such as requires special ambulatory devices or services. Vernon's Ann.Texas Civ.St. art. 5221k, § 2.01(7)(A, B).

5. Civil Rights 173

Purpose of section of Texas Commission on Human Rights Act, providing that discrimination "on basis of handicap" is discrimination on basis of condition that does not impair employee's ability to reasonably perform job, is to protect employer from claims of discrimination by employee whose handicap does, in fact, interfere with his reasonable performance of job, statute cannot be used as per se sword by employee, so that any firing of employee whose

handicap does not impair his ability to reasonably perform job will automatically be deemed a termination on basis of handicap. Vernon's Ann.Texas Civ.St. art. 5221k, § 1.04(b).

6. Civil Rights 175

Even if employee's Acquired Immune Deficiency Syndrome (AIDS) and his resulting low blood platelet count could be regarded as "handicap," they were handicap which impaired his "ability to reasonably perform a job," such that employer could not be held liable under Texas Commission on Human Rights Act for discriminating against employee based on his physical condition; although employee might be physically able to perform tasks of draftsman, evidence was presented that the slightest shock to employee, as from bumping his elbow against corner of drafting table, could rupture his spleen or otherwise cause uncontrollable, fatal bleeding. Vernon's Ann.Texas Civ.St. art. 5221k § 1.04(b).

See publication Words and Phrases for other judicial constructions and definitions.

Appeals from the United States District Court for the Northern District of Texas.

Before SMITH, DUHÉ and WIENER, Circuit Judges.

PER CURIAM:

In this Texas diversity case Plaintiff Appellant Don R. Hilton's suit against his employer, Defendant-Appellee, Southwestern Bell Telephone Company, a Missouri corporation, claiming employment discrimination against a "handicapped person" under the Texas Commission on Human Rights Act. Tex.Rev.Civ.Stat.Ann. art. 5221k (Vernon, 1987)[1] (hereafter TCHRA), was dismissed by the district court when it granted Southwestern's motion for summary judgment.

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[1]All the alleged unlawful employment practices made the subject of plaintiff's pleadings took place in 1987, so references to the Act are to that statute prior to September, 1989, the effective date of 1989 amendments.

The court held 'as a matter of law' that AIDS and its related illnesses "by themselves" are not "handicaps" as defined in TCHRA. The district court also dismissed as moot Hilton's pending motion for a preliminary injunction. Concluding that the district court committed no reversible error, we affirm and, in so doing, find it unnecessary to consider the issues raised by Southwestern on cross appeal.[2]

I.

Hilton sued Southwestern in state district court claiming that Southwestern had refused to allow him to return to work, had ultimately fired him, and had otherwise discriminated against him, on the basis of a "handicap" (AIDS-or AIDS-Related Complex (ARC), in violation of TCHRA. After Southwestern removed the case to federal district court on diversity of citizenship, Hilton moved for a preliminary injunction. Following an evidentiary hearing on the injunction at which considerable evidence was adduced — including evidence of the diagnoses and opinions of four physicians — and after the filing of briefs, but before a decision was rendered on the injunction, Southwestern filed its motion for summary judgment to which plaintiff responded. The district court granted Southwestern's motion for summary judgment based on that court's determination that Hilton was not "handicapped" for purposes of the TCHRA. Hilton's suit was dismissed, and his motion for injunctive relief was denied as moot. Hilton timely filed his notice of appeal to this court.

II.

The historical facts of this case exemplify an often replicated modern tragedy, evoking the sympathy of this court and, we speculate, that of the district court and of Hilton's employer, thereby making more difficult the decisions at each such level. Stripped of its pathos, however, this case hinges on the distinction between the meanings of *handicapped* under TCHRA and *disability*.

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[2]Southwestern asserted time bar, absence of evidence of pretext, action taken pursuant to a bona fide employee benefit plan which is not a subterfuge, and federal preemption because Hilton was covered by a collective bargaining agreement.

Southwestern hired Hilton in December, 1976. He worked in the field until a knee injury unrelated to AIDS terminated his ability to climb telephone poles, after which his employment was changed to drafting clerk in the Engineering Design section of Southwestern's Network Distribution Services Department. Late in October, 1986, Hilton's physician, Terry Pulse, M.D., diagnosed Hilton as having "HIV+/ARC with thrombocytopenia/ITP." ITP is a low blood platelet count condition described by Dr. Pulse as "life threatening!" at a time when Hilton had a platelet count of 14,000/mm^3, the normal platelet count range being from 140,000 to 250,000/mm^3.

Southwestern is a subsidiary of Southwestern Bell Corporation. Southwestern's employees participate in several of Southwestern Bell Corporation's non-contributory benefit plans. One is the Southwestern Bell Corporation Sickness and Accident Disability Benefit Plan (the Temporary Plan), providing up to fifty-two weeks of sickness disability benefits for employees with at least six months of service who are totally disabled from available telephone company work. Non-management employees, such as Hilton, who exhaust sickness disability benefits under the Temporary Plan, may apply for benefits under another Southwestern Bell Corporation Plan (the Long Term Plan). Both the Temporary Plan and the Long Term Plan provide wage replacement benefits. Separate plans provide medical expense reimbursement for both active and retired employees. For purposes of medical coverage, a former employee receiving benefits under the Long Term Plan is treated the same as is a retired employee. All of Southwestern's employees who exhaust their benefits under the Temporary Plan and who apply for and are approved for benefits under the Long Term Plan are effectively terminated from employment by being removed from the active payroll. If such an employee should recover, he may apply for re-employment, but re-employment is not guaranteed.

On or about October 31, 1986, Hilton was absent from work claiming total disability due to a medical condition. On November 7, 1986, he began receiving sickness disability benefits under the Temporary Plan. From November 3, 1986, through September 23, 1987, Dr. Pulse submitted at least twelve separate documents sub-

stantiating Hilton's total disability from work.

At the direction of Southwestern's supervisory personnel, Brady L. Allen, M.D., an internist and an independent medical consultant, examined Hilton on August 18, 1987. In his August 20, 1987, report Dr. Allen found Hilton to be "totally disabled at this point secondary to rather severe ARC."

On October 1, 1987, approximately eleven months following commencement of Hilton's disability benefit period, Hilton advised his supervisor that Dr. Pulse had released him to return to work and that he (Hilton) intended to return. His supervisors immediately advised him that he should not return to work until further notification and that another medical examination and consultation were being scheduled. On the following day another independent medical consultant, James R. Farris, M.D., examined Hilton and found him to have a blood platelet count of 6,000/mm^3. Dr. Farris advised that, due to the "severity of this patient's thrombocytopenia," Hilton should not be returned to work and that even sedentary job duties were "implausible."

The issue was then considered by James T. Wheeler, M.D., Southwestern's Medical Advisor and a specialist whom Hilton's physician, Dr. Pulse, identified as an expert whom Pulse would consult in an ITP situation. Based on the Farris examination and report, on previous medical examinations and laboratory test results, and on other information available to Southwestern's Benefit Office concerning Hilton's disability status, Dr. Wheeler advised Southwestern that Hilton was totally disabled from even his sedentary drafting position.

On October 16, 1987, supervisors in Hilton's department considered and accepted Dr. Wheeler's conclusions and decided to advise Hilton that he would not be allowed to return to work. Hilton was so advised that day and was told that upon acceptance of long term disability benefits he would be removed from the payroll.

Hilton responded to supervisors that, in his opinion, Southwestern was discriminating against him and that he intended to file legal charges against Southwestern. Hilton's attorney contacted Dr. Wheeler to discuss the basis of Southwestern's decision. A short time later, however, Hilton applied for and was granted disability status under the Long Term Plan, and was removed from Southwestern's active payroll.

Both Hilton and Southwestern agree—in fact insist—that Hilton was not allowed to return to work because Southwestern determined that Hilton would be subjected to an unacceptable risk of harm. The parties also agree that Hilton would be subjected to an unacceptable risk of harm. The parties also agree that Hilton exhausted his 52-week period of temporary disability, at the end of which he either had to go on permanent disability or return to work, but that Southwestern had denied him the latter alternative. And the parties agree that (1) Hilton's return to his job would pose no real risk to those around him; (2) the risk posed by ITP was to Hilton and Hilton alone; and (3) Hilton's termination was the direct result of his low platelet count associated with his ITP. Hilton does not contend that Southwestern's placing him on permanent disability due to his ITP was a pretext, agreeing that the real reason was his ITP resulting from AIDS or ARC. In fact, Hilton purports to support his case by quoting Dr. Wheeler's statement that Hilton's low platelet count was the "exclusive" reason for Southwestern's action, and that, as a matter of course, Southwestern disqualifies all individuals suffering from low platelet counts.[3]

Hilton also cites in support of his claim the acknowledgment by Southwestern's Dr. Wheeler that Hilton's medical condition is one which is generally perceived as severely limiting one's work-related functions, adding that both Hilton's and Southwestern's evidence supports such a view as well as the opinion that Hilton's condition is terminal and dangerous.

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[3]The record reveals that, at the time of the injunction hearing on August 4, 1989, Southwestern had 18 employees in the Dallas division who had been diagnosed as having AIDS, and that 11 of those 18 were still working.

III.

[1] This court reviews the grant of summary judgment motion de novo, using the same criteria used by the district court in the first instance. *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir.1988). We "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party." *Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc.*, 804 F.2d 879, 881 (5th Cir.1986) (per curiam) (citing *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 873 (5th Cir. 1984)). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ.P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "Material facts" are "facts that might affect the outcome of the suit under the governing law." *Id.*

If, in our de novo review, we find on the basis of the extensive summary judgment evidence presented in this case that there is no genuine issue of material historical fact or expert opinion, but only a difference of opinion between Hilton and Southwestern as to the conclusion to be drawn from those uncontested historical facts and expert opinions, the question whether the inference to be drawn therefrom is legal or factual becomes a non-issue. We find, for the reasons set forth below, that in October, 1987, Hilton was "disabled" for purposes of both the Temporary Plan and the Long Term Plan but was not "handicapped" for purposes of TCHRA. And, albeit a non-issue, we confirm on the basis of the Texas Supreme Court's pronouncement in *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 318 (Tex.1987), that determination of whether Hilton was handicapped for purposes of TCHRA is a question of law under the circumstances of this case.

IV.

A. Statutory Definitions.

[2] We begin with the plain wording of the applicable portions of TCHRA. Section 2.01(7)(A) states:

"Handicapped person" means a person who has a mental or physical handicap, including mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services, as defined in Section 121.002(4) of Human Resources Code...."

Tex.Rev.Civ.Stat.Ann. art. 522lk, § 2.01(7)(A). We find no additional clarification in that section's reference to the Human Resources Code because, in § 121.002(4) of the HRC, the definition of a "handicapped person" is, verbatim, the same as in TCHRA. Likewise, Section 2.01(7)(B) of TCHRA defines "handicap" in essentially identical terms as those used in its preceding subsection to define "handicapped person," and likewise refers to the definition in the Human Resources Code, to-wit:

"Handicap" means a condition either mental or physical that includes mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services, as defined in Section 121.002(4), Human Resources Code....

Tex.Rev.Stat.Ann. art. 522lk, § 2.01(7)(B).

In looking to the two definitional subsections in TCHRA to determine whether, in fact or in law, Hilton's ITP was a "handicap" and whether Hilton was a "handicapped person," we first encounter § 2.01(7)(A) which defines a handicapped person as "a person who has a mental or physical handicap." Needing a definition of "handicap," we must move immediately to § 2.01(7)(B) which purports to define "handicap." There we are told that "handicap" is either a mental or physical condition, but we are not told what characteristics or effects a mental or physical condition must have in order to

constitute a handicap. The only clue we are given is a non-exclusive list of some of the particular mental or physical conditions that TCHRA deems to be handicaps.

[3] For definitional statements of that ilk, the only interpretative tool available is the classic *ejusdem generis* rule: When general words follow an enumeration of persons or things, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. That rule is one of limitation, restricting general terms, such as "any other" and "and the like," which follow specific terms, to matters similar to those specified. *See, e.g., United States v. La Brecque*, 419 F.Supp. 430, 434 (D.N.J.1976).

While TCHRA's definitional subsections' use of "includes" immediately preceding the list of specific handicaps precludes that list from being interpreted as exclusive, the specific handicaps thus listed, followed by the general words, "or any other health impairment that requires special ambulatory or services" is clearly restrictive. Given the types of handicaps listed and the general language that follows the list, "handicapped" cannot mean simply *any* mental or physical condition. In applying the *ejusdem generis* rule we must, therefore, deteremine what element or elements are common to each of the particular handicaps identified in the illustrative list. Only by finding such a common thread can we gain insight into the breadth or narrowness of the category being defined by example.

[4] In the instant case we are not concerned with a question of *mental* handicap, so we disregard the particular condition appearing first in the list, mental retardation. The element common to each of the remaining, *physical* conditions in the statutory list—hardness of hearing, deafness, speech impairment, visual handicap, and being crippled—is that each is a *physiological* rather than *pathological* condition of physical health. Although the original *cause* of each condition could be pathological, congenital, traumatic or the like, in each instance the resulting *condition* is physiological. Thus, a proper application of the *ejusdem generis* rule leads us to conclude that, other than the particular physical conditions identified in the

list, the only physical health conditions capable of constituting a "handicap" for purposes of TCHRA are those which may properly be classified as *physiological* impairments. Every individual condition in the non-exclusive list is a physiological health impairment, so any "other" condition must be a physiological impairment if it is to be deemed a handicap under TCHRA. Moreover, a properly strict application of the *ejusdem generis* rule would add to the list of specific handicaps only such "other" physiological health impairments as also "require special ambulatory devices or services." TCHRA § 2.01(7)(A) and (B). *See also* Human Resources Code, § 121.002(4). Ambulatory devices are only needed to mitigate the debilitating effects of physiological impairments.

From the standpoint of statutory construction, then, the summary judgment evidence in this case eschews any possibility that Hilton's AIDS, ARC or ITP come within the ambit of TCHRA's definition of "handicapped." For all of their horrors, those diseases and conditions have produced in Hilton essentially invisible, pathological results, but no physiological impairments. His ITP has not affected his hearing, speech, vision, taste or smell. Neither has his ITP affected his ability to walk, use his hands and arms, sit or stand. The ITP has not physically "crippled" Hilton. We speculate that neither a layman nor a physician who is unknowledgeable about Hilton's disease would suspect a problem merely by looking at him and watching his physical activities on or off the job.

As TCHRA fails to define *handicap* or *handicapped person* in any manner except by analogical extension of the non-exclusive, illustrative list of health impairments of the type that constitute handicaps, our only source of information is that list of examples. Even if we disregard the additional restriction of "special ambulatory devices or services," we still cannot force AIDS or ARC or ITP into the category of health impairments defined by an *ejusdem generis* extension of that non-exclusive list of impairing conditions.

B. Discrimination Because of Handicap.

[5] The substantive provision of TCHRA applicable to the in-

statnt case is contained in ARTICLE 5. DISCRIMINATION IN EMPLOYMENT, to wit:

> "Sec. 5.01. It is an unlawful practice for an employer:
> (1) to ... discharge an individual or otherwise discriminate against an individual with respect to compensation or the terms, conditions or privileges of employment because of ... handicap ...

Basically ignoring the definitional provisions of § 2.01(7)(A) and (B), Hilton insists that one of the "Specific rules of construction" found in § 1.04 of TCHRA somehow mandates a determination in his favor under the above quoted discrimination provision of ARTICLE 5. The special rule of construction relied on by Hilton is subsection (b):

> (b) In Article 5, "because of handicap" or "on the basis of handicap" refers to discrimination because of or on the basis of a physical or mental condition that does *not* impair an individual's ability to reasonably perform a job. (emphasis added).

TexRev.Civ.Stat.Ann. art. 522lk, § 1.04(b).

Agreeing with Southwestern that his medical condition, ITP, is one which is generally perceived as severely limiting one's work-related functions and that it is "beyond dispute" that his condition is "life threatening," Hilton emphasizes in his brief to this court that "[n]evertheless, [Hilton's] illness, which restricts his ability to perform various physical functions,... *does not* affect his ability to reasonably perform the duties required by the sedentary job of a Drafting Clerk." (emphasis in original).

Accepting, arguendo, Hilton's first thesis that, as per *Redmon*, a claimant's threshold burden in seeking to establish that he is "handicapped" for purposes of TCHRA is to show that his disqualifying condition is one which is "generally perceived as severely limiting him in performing work-related functions in general," *Redmon*, 745 S.W.2d at 318; and accepting, arguendo, his second thesis that his own illness does not prevent the reasonable performance of duties associated with his Drafting Clerk job, we must nevertheless conclude that he is neither "handicapped" as defined in TCHRA, nor,

if he were handicapped, discriminated against, under that act. To hold otherwise would be to treat § 1.04(b) as a mandatory, per se rule, requiring an automatic finding of discrimination in every instance of a "handicap" that does *not* impair the employee's ability to perform the specific functions of a job. Even accepting Hilton's first two theses, his logic to reach the conclusion of his syllogism is severely flawed, as is his reliance on *Redmon*. First, the obvious and only purposes of § 1.04(b) of TCHRA is to shield employers from claims of discrimination by an employee whose physical or mental condition is a "handicap" which does in fact impair his "ability to reasonably perform a job." Simply put, TCHRA does not force employers to hire or retain a handicapped person who, because of his handicap, simply cannot perform a job. But Hilton would have us turn this employer's shield into an employee's per se sword, so that the firing of any employee who has a handicap that does *not* impair his ability "to reasonably perform a job" will automatically be deemned to be a termination "because of" such handicap and thus per se discriminatory. Such a converse application of § 1.04(b) simply is not warranted. In fact, it was just such an approach by the Texas Court of Appeals that the Texas Supreme Court reected in *Redmon*.

C. Other Authorities.

But even if that were the rule—and certainly no Texas court has held it to be—Hilton could not rely on it under the facts of his case. Remembering that our task here is to determine whether Hilton's AIDS or ARC, or his ITP produced by those conditions, is a "handicap" within the meaning of TCHRA, we are forced to reject Hilton's urgings that we be guided by cases which have classified AIDS and AIDS related conditions as handicaps under the Federal Rehabilitation Act. The Texas Supreme Court in *Redmon* forbids such unwarranted analogy. *Redmon*, 745 S.W.2d at 318.

Neither is Hilton's reliance on a 1987 opinion of the Texas Attorney General (Tex.Atty.Gen.Op. No. JM—648 (March 19, 1987)) valid. Most significantly, that opinion predated *Redmon* which obliterated the premises on which the Attorney General's opinion was based. Also, that Attorney General'a opinion, issued to the Texas

Commission on Human Rights, dealt solely with *standing* and merely concluded, in the negative, that "a number of mental and physical conditions, including chronic illnesses and diseases may be covered under the Act for purposes of a person having a standing to file a complaint" so that, for purposes of standing, "a handicap is not limited to mental and physical conditions expressly enumerated section 2.01(7) of the act and may include chronic illnesses and contagious diseases." *Id.* at 2, 6. Hilton's standing is not at issue; and Southwestern has nowhere argued that the illustrative definitional lists in § 2.01(7)(A) and (B) are exclusive. We certainly recognize that a physical condition, such as those of a physiological nature identified in the non-exclusive lists in TCHRA, which *results from* a chronic illness or contagious disease may well constitute a "handicap" for purposes of TCHRA. In those instances, however, it is the physiological condition produced by the disease or illness, not the disease or illness itself, that is the handicap.

We concur in the determination of the district court that Hilton's ITP is *not* a handicap for purposes of TCHRA. It clearly produces no mental condition affecting his job performance; neither does it produce an impairing, job-related physiological condition that, under the *ejusdem generis* rule, could be found to fit into the same set of conditions as by analogical extension is defined in the non-exclusive list of examples of the members of that set.

[6] Not only does Hilton misconstrue the purpose and use of the special rule of construction of § 1.04(b) of TCHRA, he also reaches an erroneous conclusion that his "physical or mental condition ... does not impair [his] ability to reasonably perform a job." Had Southwestern terminated him for ITP at the time he was lineman and not reassigned him to the position of drafting clerk, a position which by his own declaration is the most sedentary job in the company, he may well have been able to show discrimination because of handicap within the meaning of TCHRA because § 1.04(b) talks about performing "a job" and not "his job." But even if we read "a job" to mean "any job," Southwestern met that test because when Hilton advised Southwestern of his AIDS/ARC/ITP, he already held the safest job Southwestern had for sufferers of ITP.

Hilton's problem with § 1.04(b) is with the word "reasonably." Agreeing for the sake of argument that Hilton's ITP does not impair his ability to perform the specific work functions of a drafting clerk, we nevertheless find it inescapable that his performance cannot be deemed reasonable. Although he poses no threat to others, Hilton's return to work as a drafting clerk would pose to himself a constant risk of instant death. The testimony of his physician, of two independent consulting physicians, and of Southwestern's physician are unanimous in the conclusion that Hilton's alarmingly low platelet count places him in harm's way with his every move. The mere act of traveling from home to work and back each day would be death defying. The slightest jar, whether from a "fender bender," from his own elbow, or from the most innocuous inanimate object—the corner of a drafting table, a file cabinet, a water fountain, or a fellow worker's slightest jostle—could rupture his spleen or otherwise cause uncontrollable, fatal bleeding.

TCHRA does not tell employers that, despite such constant exposure to job-related fatality, a condition such as Hilton's, does not impair an employee's ability to "reasonably" perform a job. What could be more unreasonable than to tell an employer that, simply because the employee's mental or physical condition does not prevent his drawing lines on tracing paper, using a T-square, or otherwise physically drafting, the employee's physical condition cannot be said to prevent the *reasonable* performance of duties generally associated with or related to the drafting clerk job. Every trip to the pencil sharpener, to the supply closet, to the restroom, to a supervisor's office, or elsewhere—each a job-related function—is for Hilton a potentially fatal act. Working under such Damoclean conditions simply cannot be construed to be a *reasonable* job performance.

D. The Lessons of Redmon.

As Hilton states in his brief, there are no court decisions construing ITP, or for that matter AIDS or ARC, in the context of TCHRA. Hilton acknowledges that the Texas Attorney General's opinion on standing is the only Texas authority touching on Hilton's disease or contagious diseases generally and, as we have already determined,

it is inapposite. *Redmon* is the only significant Texas case to date treating in depth the definition of *handicapped* under TCHRA. Although Hilton purports to rely on *Redmon*, that reliance is sorely misplaced; *Redmon* actually supports Southwestern's position.

Admittedly, *Redmon* is somewhat distinguishable from this case on its facts—Ms. Redmon's condition was sight impairment which, unlike Hilton's ITP, is not only a physiological impairment in the nature of those contained on the definitional lists but, as a "visual handicap," is one of the illustrative examples expressly listed in § 2.01(7)(A) and (B). Ms. Redmon's visual impairment was moderate while Hilton's disability is extreme. *Redmon* is nevertheless instructive. The Texas Supreme Court found, as we noted above, that TCHRA's definitions of " 'handicap' and 'handicapped person' do not detail what is covered by that term...." So, said that court, "[w]e have therefore examined the entire Act, the predecessor acts, and the legislative history of these acts to determine what the Act is intended to cover." *Redmon*, 745 S.W.2d at 316 (citations omitted). Through its exhaustive examination the Texas Supreme Court found, inter alia, that

> A review of the statutes and the legislative history of this Act reveals that the legislature was concerned with protecting persons with impairments of an incapacitating nature. Furthermore, the legislature obviously chose not to employ the definition of "handicap" in the federal Rehabilitation Act, 29 U.S.C. § 701-796(i). In fact, the legislature did not even refer to that Act in section 1.02 describing the purposes of the Act. We therefore choose not to employ the definition of "individual with handicaps" in 29 U.S.C. § 706(8).

Id. at 317—18.

In light of such strong rejection, the lengthy discussion of cases under the federal Act in Hilton's brief is unavailing and disingenuous, as is his citation to the Texas Attorney General's opinion without acknowledging that it was emasculated by the Texas Supreme court in *Redmon*. Equally disingenuous is Hilton's argument that *Redmon* stands for the proposition that determination of a handicapped condition is a question of fact not, as found by the district court, a

question of law. In his brief to this court, Hilton quotes *Redmon's* statement that "[t]he question of whether a person is 'handicapped' is generally a question of fact for the fact finder." But deliberately omitted from his brief are the two sentences in the *Redmon* opinion which immediately follow the one he quoted. Those sentences read:

> "We hold that based on this summary judgment record, however, there is no evidence that Redmon is handicapped and thus, no fact issue has been raised. *As a matter of law*, Redmon's disabilities do not constitute those severe impairments which article 522lk was intended to protect." (emphasis added).

Redmon, 745 S.W.2d at 318.

As was the case with Ms. Redmon whose left eye vision could only be corrected to 20-60 and was thus not deemed by the court to be the type of person "with impairments of an incapacitating nature," *id.*, Hilton's disabilities do not constitute those severe impairments which TCHRA was intended to protect. *Id.* His disease does not produce physiological impairments which prevent him from going to and from work, moving within the building, sitting, standing, obtaining supplies, going to restrooms, lunchrooms, supervisor's offices, or the like. By his own insistence, Hilton's ITP has not *impaired* his ability to perform the professional acts of a drafting clerk. The distinction is that, in performing all of those work-related functions without any limitation, much less severe limitations, he is nevertheless a classical "accident looking for a place to happen."

In a nutshell, Hilton is *totally disabled* but he is neither "severely impaired" as required by *Redmon* nor "handicapped" within the restrictive definition of TCHRA.

To hold otherwise would transform every characteristic an employer uses to make employment decisions into a "handicap." Employers should have the right and the freedom to make their employment decisions without interference unless they discriminate against some protected group which might otherwise be unfairly denied employment.

Redmon, 745 S.W.2d at 318.

V.

The summary judgment evidence establishes without factual disagreement that Southwestern treats all employees with ITP as *disabled* ust as it did Hilton. Both the Temporary Plan and the Long Term Plan provide *disability* income for all employees thus disabled; and Hilton was no exception. Other non-contributory plans sponsored by Southwestern's parent corporation provide medical expenses reimbursement to such disabled employees. If in the future Hilton's ITP should diminish to such a degree that his platelet count rises to a safe level, he will be free to apply for reinstatement of employment. All of those benefits that Southwestern provides for its employees hardly paint a picture of a discriminatory employer.

Leaning heavily on professional opinions—those of its own Medical Advisor, two independent consulting physicians, and Hilton's own physician—Southwestern made a totally defensible determination that Hilton is disabled and thus entitled to all disability benefits provided by his employer—a determination which Hilton neither alleged nor presented evidence to prove to be pretextural. If anything in this case has the appearance of pretext it is the insistence by Hilton and Dr. Pulse that in October, 1987, when Hilton's platelet count had dropped to 6,000/mm^3 he was no longer disabled and was fit for work. After all, it was Hilton and Dr. Pulse who, in October, 1986, and throughout the ensuing eleven months, had maintained continuously that Hilton was totally disabled from working as a drafting clerk because his platelet count was 14,00/mm^3! One can only ask rhetorically how a worker can be totally disabled for the fifty-two weeks of the Temporary Plan due to a low platelet count but be fit for work when the benefit period runs out despite a platelet count of less than half the count that was so "life threatening" as to produce total disability only a year earlier.

For the foregoing reasons we concur in the district court's grant of summary judgment in favor of Southwestern, dismissing Hilton's lawsuit with prejudice. We also concur in that court's denial of injunctive relief to Hilton as moot. Our agreement with the district court also makes consideration of the issues raised in Southwestern's cross appeal unnecessary. The judgment and related rulings of the district court are

AFFIRMED.

(2)

No. 91-730

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DON R. HILTON,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

Petition For Writ Of Certiorari From The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FOREWARD

Citations to the transcript of the August 4, 1989 hearing on Petitioner's motion for a preliminary injunction (Volume 7 of the Record on Appeal) are made by the letters "Tr." followed by the page number on which the citation appears; thus, "Tr. 37-40" refers to pages 37 through 40, inclusive, of the transcript.

Citations to the exhibits admitted into evidence at the August 4, 1989 hearing are made by either "Plt. Ex." (meaning the Plaintiff-Petitioner's Exhibit) or "Def. Ex." (meaning Defendant-Respondent's Exhibit); thus, "Def. Exs. 11, 15-17" refers to Respondent's Exhibits Nos. 11 and 15 through 17, inclusive.

Citations to the Record on Appeal are made by the letter "R." followed by the volume of the record and the page number on which the citation appears. Exhibits offered by the parties in support of or in opposition to Respondent's motion for summary judgment, whether or not attached to affidavits, are made by reference to the page number of the record at which they appear. The unnumbered side of double-sided documents in the record are referenced by the letter "a." Thus, "R. 2:235-367a" refers to volume 2 of the record, pages 235 through the backside of page 367.

No. 91-730

In The

Supreme Court of the United States

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DON R. HILTON,

Petitioner,

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Petition For Writ Of Certiorari From The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF THE ARGUMENT

The trial court and the Fifth Circuit applied Texas law. Throughout the prosecution of his case, Petitioner Hilton has sought the imposition of federal handicap discrimination law, not Texas law. Hilton has also misinterpreted the leading Texas case defining the terms "handicap" and "handicapped person" and has erroneously relied on an out-dated opinion of the state's former Attorney General.

Under Texas law, the terms "handicap" and "handicapped person" have specific meaning. In interpreting

the meaning of these terms, the Texas Supreme Court has expressly rejected the definitions employed under the federal handicap discrimination law. Under the statute in question, Hilton must actually be handicapped, as opposed to being perceived as such. To be handicapped, a person must be either mentally or physically handicapped. To be physically handicapped, a person must have a physical impairment of the same nature as the illustrative impairments listed in the statutory definition and that physical impairment must severely limit the performance of work-related functions in general.

Hilton is not handicapped under the Texas statute. Hilton is physically able to perform job related tasks. Nevertheless, Hilton is medically disabled because his extremely low blood platelet count condition makes the daily activities associated with even sedentary employment life threatening and, consequently, Hilton should not work as a medical precaution. As Hilton is not physiologically impaired and is not otherwise severely physically or mentally limited in performing work-related functions in general, Hilton is not handicapped under Texas law.

Hilton is also barred from recovery in this case because, under the express terms of the statute in question, Hilton cannot maintain a suit for discrimination if he is unable to reasonably perform the job. As Hilton's medical condition makes the performance of any sedentary job with Respondent SWBT life threatening, Hilton is unable to reasonably perform his job.

STATEMENT OF FACTS

Southwestern Bell Corporation has established certain non-contributory disability plans for its employees. (R. 2:218-219.) Southwestern Bell Telephone Company ("SWBT") is a participating company in those disability plans. (R. 2:218-219.) The Southwestern Bell Corporation Sickness and Accident Disability Benefit Plan ("Sickness Plan") provides up to 52 weeks of sickness disability benefits for employees who have at least six months of service and who are totally disabled from available telephone company work. (R. 2:236-237, 274-275.) The Sickness Plan is often informally referred to as the "short term disability" plan. Nonsalaried employees who exhaust sickness disability benefits under the Sickness Plan may apply for benefits under the Southwestern Bell Corporation Long Term Disability Benefit Plan for Nonsalaried Employees ("Long Term Plan"). (R. 2:295, 297-298.) Medical expenses are provided under separate plans for both active and retired employees. (R. 5:154-171a.) For the purposes of medical coverage, a former employee receiving benefits under the Long Term Plan is treated on the same basis as a retired employee. (R. 5:127a.)[1]

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[1] In Hilton's Petition for Writ of Certiorari, Hilton claims that his termination "has deprived him of the opportunity to acquire medical care which may prolong his life." (Petition, p. 5, n. 2.) As a recipient of Long Term Plan benefits, Hilton is given the same medical coverage provided to retired employees. That coverage is the same level of medical coverage provided to SWBT's active employees. If Hilton has been denied coverage under the medical plan on account of any exclusion (such as those applying to experimental or investigatory treatment), he would also be denied such coverage as an active employee.

All of SWBT's employees who exhaust their Sickness Plan benefits and who apply for and are approved for benefits under the Long Term Plan are effectively terminated by their removal from the active payroll. (R. 2:219, 302; R. 5:223a.) The Long Term Plan is the subject of an agreement entered into by and between SWBT and the Communications Workers of America ("CWA"), Hilton's sole collective bargaining agent. In that agreement, dated August 10, 1986, SWBT consented to provide a long term disability plan substantially in accordance with Attachment A annexed to that agreement, which reads in pertinent part as follows:

> An individual covered under the plan after the expiration of sickness disability benefits is considered a former employee and as such has no guarantee of reemployment if no longer disabled.

(R. 5:108-112.)

In October 1986, Petitioner Don R. Hilton ("Hilton") was a nonsalaried employee of SWBT, employed as a Drafting Clerk in the Engineering Design section of SWBT's Network Distribution Services Department. (R. 2:215.) Due to a knee injury (unrelated to Hilton's later diagnosed HIV condition), Hilton was given the Drafting Clerk position because he was unable to climb telephone poles. (R. 4:53-55, 61-65.) From on or about October 31, 1986, Hilton was absent from work claiming total disability due to a medical condition. (Tr. 76; Def. Ex. 4; R. 4:56-57.)[2] In accordance with the terms of the Sickness

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[2] In his Petition, Hilton implies he was involuntarily placed on disability. This is incorrect. Hilton advised SWBT that he was disabled and chose to absent himself from the work place on advice of his treating physician.

Plan, Hilton began receiving sickness disability benefits on November 7, 1986. (R. 2:238.)

From and including November 3, 1986 to and including September 23, 1987, Hilton's treating physician, Terry Pulse, M.D., submitted at least twelve separate documents substantiating Hilton's total disability from work. (Tr. 65-68; Def. Exs. 3-11, 13, 15, 21-22.) Hilton's disability was described by Dr. Pulse as "HIV+/ARC with Thrombocytopenia/ITP." (Tr. 52-53, 98; Def. Exs. 3-11, 13, 15, 21-22.) "Thrombocytopenia" or "ITP" is a low blood platelet count condition which Dr. Pulse described as "LIFE-THREATENING!" when Hilton had a platelet count of 14,000/mm^3. (Def. Ex. 5.) The normal blood platelet count range is from 140,000 to 250,000/mm^3. (Tr. 101.)

In August 1988, Hilton was directed to submit to an independent medical consultation to confirm his treating physician's opinion that he was totally disabled from his sedentary job with SWBT. (Tr. 111-115.) On August 18, 1987, Hilton was seen for an independent medical consultation by Brady L. Allen, M.D., a doctor of internal medicine. (Tr. 114-115.) In his report dated August 20, 1987, Dr. Allen reported that Hilton was "totally disabled at this point secondary to rather severe ARC." (Tr. 115-119; Def. Ex. 19.)

On October 1, 1987 (near the end of Hilton's 52 weeks of sickness disability benefits), Hilton advised his supervisor, Ms. Patricia Smallwood, that his doctor (Dr. Pulse) had released him to return to work and that Hilton was returning to work. (Tr. 17, 77-79.) Hilton was advised that he should not return to work until further notification

and that another medical examination and consultation was being scheduled. (Tr. 77-78; R. 2:311-312, 315.)

On October 2, 1987, Hilton was examined by a second independent medical consultant, James R. Farris, M.D. (Tr. 122-124; Def. Ex. 27; R. 2:325.) In that examination, Hilton was found to have had a blood platelet count of only 6,000/mm^3. (Tr. 126; Def. Ex. 27; R. 2:325-326, 331.) In his report, Dr. Farris advised that, due to the "severity of this patient's [Hilton's] thrombocytopenia [low blood platelet count]," Hilton could not be returned to work and that even sedentary job duties were implausible. (Def. Ex. 27; R. 2:325-326.) As a result of Dr. Farris' examination and report, previous medical examinations and laboratory test results and other information available to SWBT's Benefit Office as to Hilton's disability status, James T. Wheeler, M.D., SWBT's Medical Advisor, advised Hilton's department that Hilton remained totally disabled from his sedentary position with the company. (Tr. 128-129; R. 1:215-216.) Management accepted the medical advice of the consultants and Dr. Wheeler and, on October 16, 1988, advised Hilton of its decision not to allow him to return to work due to his medical disability.

Due to Hilton's extremely low blood platelet count of 6,000/mm^3 in October 1987, Hilton was unable to reasonably perform the duties of his Drafting Clerk job with safety and, had Hilton been required to undertake the obligations of regular employment with SWBT, Hilton would have been exposed to a substantial risk of serious bodily injury or death. (Tr. 128-133; Def. Ex. 27; R. 2:323-350.)

Hilton filed his action on October 10, 1988 in the state district court of Dallas County, Texas. SWBT removed the action pursuant to a Petition of Removal filed November 21, 1988. Hilton filed a motion for injunctive relief and a hearing was held on August 4, 1989 on that motion. After the August 4 hearing but before the trial court ruled on the motion, SWBT timely filed a motion for summary judgment. In that motion, SWBT asserted five separate grounds for a judgment in its favor. In the motion, SWBT contended that Hilton was not "handicapped" as that term is employed in the Texas Commission on Human Rights Act, Tex. Rev. Civ. Stat. Ann. art. 5221k (Vernon 1987)[3] ("Act"); that Hilton failed to file timely his administrative complaint with the Texas Commission on Human Rights ("Commission"); that there is no evidence rebutting SWBT's legitimate, non-discriminatory reason proffered in explanation of its conduct in question (that is, there is no evidence that SWBT discriminated against Hilton or otherwise committed an "unlawful employment practice"); that Hilton's termination was made pursuant to a bona fide employee benefit plan which is not a subterfuge to evade the provisions of the Act; and, that

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[3] The Act was amended in 1989 by the 71st Texas Legislature. The amendments include changes to the statutory definitions of "handicap" and "handicapped person" at issue in this case. Those amendments did not go into effect until September 1, 1989. As all alleged unlawful employment practices took place during the months of October and November 1988, the Act in existence at that time, including the statutory definitions of "handicap" and "handicapped person," governs Hilton's alleged claims.

Hilton's common law claim for alleged wrongful discharge failed to state a claim under Texas law upon which relief could be granted and any such alleged claim was preempted by federal law.

The trial court granted SWBT's motion for summary judgment with respect to Hilton's alleged claim for wrongful discharge and with respect to the alleged violations of the Act. Hilton's claim for wrongful discharge was dismissed because his claim was preempted by federal law. Hilton's claims for violations under the Act were dismissed because Hilton was found as a matter of law not to be a "handicapped person."

On appeal to the United States Court of Appeal for the Fifth Circuit, Hilton challenged the trial court's determination that he was not handicapped. SWBT filed a cross-appeal raising the three remaining issues argued in its motion for summary judgment applicable to Hilton's claim of violations under the Act. In affirming the trial court, the Fifth Circuit never reached the issues raised in SWBT's cross-appeal. *Hilton v. Southwestern Bell Telephone Company*, 936 F.2d 823, 825 n.2 (5th Cir. 1991)(per curiam). Any decision by this Court with respect to the Fifth Circuit's decision affirming the trial court's judgment must take into consideration the right of SWBT to be heard on those issues raised in its cross-appeal.

REASONS FOR DENYING THE WRIT

Simply stated, Hilton's Petition should be denied because, contrary to his assertion, the Fifth Circuit did not abdicate its obligations under *Erie RR. Co. v. Tompkins*,

304 U.S. 64 (1938), to apply the substantive law of Texas in this diversity jurisdiction case. What is described in Hilton's Petition for Writ of Certiorari as a "niggling" interpretation of the Act is in fact a careful and well-reasoned application of Texas law to this case. (Hilton's "Petition for Writ of Certiorari," p. 6.)[4] Even a cursory review of the record shows that there has been no breach of the appellate court's duty under *Erie*.

I. HILTON IS *NOT* A "HANDICAPPED PERSON" AS THAT TERM IS EMPLOYED UNDER THE ACT.

Throughout the course of this litigation, Hilton has acted as if the terms "AIDS" and "ARC" were verbal talismans, the mere invocation of which would establish his entitlement to relief under the Act. Hilton is mistaken.

(a) The Definition of "Handicapped Person"

The definition of "handicapped person" is found in Article 2, Section 2.01(7)(A) of the Act and reads in pertinent part:

> (7)(A) "Handicapped person" means a person who has a mental or physical handicap, including mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services, ...

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[4] Hilton's Petition for Writ of Certiorari will be referred to as simply "Petition."

Tex. Rev. Civ. Stat. Ann. art. 5221k § 2.01(7)(A) (Vernon 1987). The meaning of this definition was discussed in *Chevron Corporation v. Redmon*, 745 S.W.2d 314 (Tex. 1987). The *Chevron* opinion is particularly important to this action for three reasons: (1) the Texas Supreme Court held that the definition of "individual with handicaps" found in the federal Rehabilitation Act, 29 U.S.C. § 706(8), (the "Rehabilitation Act") was *not* applicable to the Act; (2) the court held that a plaintiff seeking relief under the Act must prove that he is *in fact* a handicapped person as that term is used in the Act (as opposed to merely being "perceived" as such); and, (3) the court set out a minimum guideline by which the issue of whether a person is a "handicapped person" under the Act may be evaluated. *Id.*, at 318. In stating this minimum guideline, the *Chevron* court instructed that "[w]hile under article 5221k, a person may not sue if his handicap impairs his ability to do *that* particular job, in order for a disability to be considered a handicap in the first place it must be one which is generally perceived as severely limiting him in performing work-related functions in general." *Id.*

(b) No Evidence That Hilton is Handicapped

A review of the evidence offered in support of SWBT's motion for summary judgment, as well as that presented at the hearing on Hilton's motion for preliminary injunctive relief, shows that Hilton claims no limitation on his ability to perform work-related functions at all. (Tr. 38-39, 167, 169-170.) This is consistent with the medical record which is beyond dispute. That record shows that Hilton's disability is the result of his

extremely low blood platelet count which is such that increased activity in and of itself presents a substantial risk of severe bodily injury or death. (Tr. 128-133; Def. Ex. 27; R. 2:323-350.) In short, the disease process is not one which makes Hilton physically or mentally unable to perform work-related functions in general but rather means that Hilton should not perform those functions because the concomitant increase in daily activities presents a substantial risk of serious bodily injury or death.

The medical doctors all agree that Hilton's ITP condition presents a very substantial risk of serious bodily injury or death. Hilton's own treating physician (Dr. Pulse) advised that Hilton was totally disabled from his sedentary job as a drafting clerk when his blood platelet count was 14,000/mm^3. In a written statement to substantiate Hilton's disability status, Dr. Pulse asserted that a blood platelet count of 14,000/mm^3 was "LIFE THREATENING!" On the basis of that diagnosis, SWBT paid Hilton sickness disability benefits and excused his absence from work for almost twelve months. Moreover, in his deposition, that same doctor, Dr. Pulse, testified that, even with sedentary jobs, persons with blood platelet counts below 50,000/mm^3 "ought to really seriously consider not working"; that persons with counts below 30,000/mm^3 are becoming "critical"; and, that persons with counts below 12,000/mm^3 have "got real problems." (R.4:102.) At the time that SWBT decided that Hilton was still disabled in October 1987, Hilton had a blood platelet count of 6,000/mm^3, less than half the count that Dr. Pulse described as life threatening. (Tr. 124-126.) No evidence was ever offered by Hilton challenging this finding.

In his Petition, Hilton asserts that SWBT agrees with him that Hilton's condition is "one which generally *is* perceived as severely limiting one's work-related functions," citing the opinion of the Fifth Circuit.[5] (Petition, p. 7, emphasis supplied by Hilton.) Hilton is mistaken. SWBT has never conceded that Hilton's condition is one which is generally perceived as severely physically or mentally limiting his performance of work-related functions. The source of Hilton's error is his own distortion of the testimony of James T. Wheeler, M.D., SWBT's Medical Advisor. Hilton takes Dr. Wheeler's testimony out of context and argues that Dr. Wheeler, and thus SWBT, concede that Hilton's condition meets the *Chevron* guideline. Hilton's argument is the height of sophistry.

In the snippet of Dr. Wheeler's testimony cited in Hilton's Petition, Dr. Wheeler states that, in his opinion, Hilton's condition would severely limit his work-related functions. (Petition, p. 8; Tr. 142.) In order to understand Dr. Wheeler's testimony it must be read in context. Dr. Wheeler never acknowledged any physical or mental limitations on Hilton's ability to perform work. Without equivocation, Dr. Wheeler's testimony is that Hilton is medically disabled from work due to the limitations on his daily activities imposed by the substantial risk of

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[5] Hilton takes the Fifth Circuit's language out of context. The reference in the Petition is to a statement in the opinion in which the court recaps *Hilton's* argument, not SWBT's argument. 936 F.2d at 829. The court is simply arguing that even if Hilton's prior assertions were correct, Hilton still cannot prevail because Hilton's condition affects his ability to reasonably perform the job in question.

serious bodily injury or death created by his ITP condition. The normal bumps and grinds that everyone else takes for granted are all potentially death producing events for Hilton. This medical precaution imposed on Hilton limits his ability to perform any work, even sedentary work. Thus, while Hilton is arguing that Dr. Wheeler agrees that his condition severely limits him *physically* in performing work-related functions in general, Dr. Wheeler is actually testifying that the medical condition requires Hilton to refrain from all work and that his condition therefore limits him *prudentially* from performing work-related functions.

What is truly interesting about Hilton's specious argument is that, on the one hand, he embraces Dr. Wheeler's testimony (that he is limited in performing work-related functions) and, on the other hand, totally rejects the medical opinion underlying that testimony (that Hilton's ITP condition renders Hilton medically disabled from sedentary work because the increased daily activity associated with it places Hilton in substantial risk of serious bodily injury or death). Hilton cannot have it both ways.

Such duplicitous reasoning is at the very heart of Hilton's case. Hilton was content to rely on his status as a disabled employee, to be excused from work and to be paid sickness disability benefits due to his ITP condition when it was a matter of the Sickness Plan. But disability absence and being paid disability benefits for the same condition is not acceptable to Hilton when it is a matter of the Long Term Plan. Furthermore, Hilton seeks to embrace the limitations imposed by the ITP condition on his "work-related" functions when that means he is a

"handicapped person" but is not willing to accept the implications of his ITP condition when it means that he cannot return to his sedentary job with SWBT due to the very real risk of serious bodily injury or death.

II. HILTON WAS NOT DISCRIMINATED AGAINST BECAUSE HIS CONDITION IMPAIRS HIS ABILITY TO REASONABLY PERFORM HIS JOB

The evidence in this case confirms that SWBT had a legitimate, non-discriminatory reason for its decision not to allow Hilton to return to work in October 1987. The record is equally clear that there is no evidence that SWBT was in error in October 1987 in determining that Hilton was not able to reasonably perform his job because his ITP condition exposed him to a substantial risk of serious bodily injury or death if he were to engage in the increased activities associated with the daily aspects of regular employment, even sedentary employment.[6] The Fifth Circuit was correct in holding that, under the Act, it is not an unlawful employment practice for an employer to exclude a person from a job because of a substantial risk of serious bodily injury or death to the employee. *Hilton*, 936 F.2d at 830-831.

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[6] The newly finalized regulations propounded by the federal Equal Employment Opportunity Commission for enforcement of the Americans with Disabilities Act, 42 U.S.C. § 12101, also recognizes the right of employers to determine whether an employee can perform a job without exposing himself to a substantial risk of serious bodily harm or death. 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2).

The decision not to allow Hilton to return to the work place was only made after nearly twelve months of constantly monitoring Hilton's medical condition. Dr. Wheeler and Dr. Pulse conferred during Hilton's twelve-month sickness disability absence with respect to his condition and the appropriate treatment. (R. 4:101.) Dr. Wheeler had Hilton submit to two independent medical consultants to confirm his opinion that someone with a severe case of ITP should not engage in sedentary work. Dr. Wheeler himself is a hematologist/oncologist with considerable experience in treating patients with AIDS. (Tr. 89-91.) There is no evidence that the decision made by SWBT in not allowing Hilton to return to the work place was the result of some stereotyping or archaic attitudes or that SWBT merely applied a blanket exclusion to Hilton. Rather it is clear from the substantial record developed on Hilton's medical condition that the decision was in fact a highly individualized, fair and medically reasonable decision.

III. THE FIFTH CIRCUIT MET ITS OBLIGATIONS UNDER *ERIE* BY APPLYING TEXAS LAW TO ITS ANALYSIS OF THIS CASE

As shown above, the Texas Supreme Court expressly rejected the definition and, by logical extension, the value of the cases interpreting the definition of individual with handicap under the Rehabilitation Act. There is no question that, in drafting handicapped employment discrimination laws, states are free to adopt more restrictive language than is employed in the Rehabilitation Act.

(a) The Fifth Circuit was Faithful to the Act

It is clear from the Fifth Circuit opinion that the court was scrupulously faithful to the Act. Section IV, Subsections A and B, of the opinion is a well-reasoned analysis of the text of the Act. The court examined in detail the definitions at issue in this case. Given the definitions of "handicap" and "handicapped person" set out in the Act, the court was correct in construing Sections 2.01(7)(A) and (B) of the Act as pertaining to mental and physical impairments, as opposed to mere pathological conditions. The court's summary in this regard is consistent with the clear meaning of the text of the Act.

> Thus, a proper application of the *ejusdem generis* rule leads us to conclude that, other than the particular physical conditions identified in the list [of illustrative handicaps], the only physical conditions capable of constituting a "handicap" for purposes TCHRA are those which may properly be classified as *physiological* health impairments. Every individual condition in the nonexclusive list is a physiological health impairment, so any "other" condition must be a physiological impairment if it is to be deemed a handicap under TCHRA.

Hilton, 936 F.2d at 828. In support of the propriety of applying the *ejusdem generis* rule to statutory interpretation, the Fifth Circuit cited a federal district court case. The court could have as easily cited Texas court decisions applying this rule to statutory interpretation. *County of Harris v. Eaton*, 573 S.W.2d 177, 179 (Tex. 1978)(interpreting "special defect" under the Texas Tort Claims Act);

and, *Hightower v. State Com. of Education*, 778 S.W.2d 595, 598 (Tex. App. – Austin 1989, no writ)(interpreting "other full-time professional employee" under Texas Term Contract Renewal Act).

As Hilton clearly has no such physiological condition, he cannot be deemed to be handicapped under the Act. *Hilton*, 936 F.2d at 829. Hilton's real objection to the court's analysis is that it did not conform to the standard used in the federal cases construing the Rehabilitation Act. Yet, as seen above, that standard was expressly rejected by the Texas Supreme Court in *Chevron*. *Chevron*, 745 S.W.2d at 317-318.

(b) The Fifth Circuit Considered the Opinion of the Texas Attorney General Interpreting the Act

The Attorney General's opinion cited by Hilton [Tex. Atty. Gen. Op. No. JM-648 (March 19, 1987)] also fails to provide authority for Hilton's contention that he is a "handicapped person." The Attorney General's opinion was written *prior* to the *Chevron* decision. In that opinion, the Attorney General makes two conclusions which are flatly rejected by the Texas Supreme Court in the *Chevron* decision: (1) that a person states a viable cause of action under the Act if he shows that the employer *perceived* him to be handicapped "regardless of whether the person is actually handicapped"; and, (2) that the Rehabilitation Act is authority for interpreting the Act. Both of these critical points in the opinion were totally refuted by the *Chevron* court. *Chevron*, 745 S.W.2d at 316 and 318.

The Attorney General's opinion was entirely based on this Court's opinion in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), which found that an elementary school teacher with tuberculosis was a "handicapped individual" under the Rehabilitation Act. The *Arline* decision is consistent with the broader language and standards applicable to the Rehabilitation Act which are not applicable to the Act at issue here. *Id.*, 480 U. S. at 280-281.[7] Thus, the Fifth Circuit only rejected the Attorney General's opinion because it was inconsistent with the opinion of the Texas Supreme Court in *Chevron*.

(c) The Fifth Circuit was Faithful to Texas Case Law

Hilton argues that the Fifth Circuit abandoned its *Erie* obligations because it failed to heed the direction of the Texas Supreme Court in the *Chevron* decision that "[t]he question of whether a person is 'handicapped' is generally a question of fact for the fact finder." Hilton is either arguing that this language always makes summary judgment inappropriate under the Act or that this language makes summary judgment appropriate only when

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[7] As footnote 7 of the *Arline* opinion makes clear, the Court found that the plaintiff had a history of physical impairment within the broad definition of the Rehabilitation Act and did not decide the issue of whether an asymptomatic disease carrier (such as a person with the AIDS virus) would be considered as having a physical impairment or the issue of whether a person would be deemed handicapped simply by virtue of having a contagious disease. *Arline*, 480 U.S. at 282 n.7.

it is a question of the severity of the alleged impairment. Neither argument is correct.

The *Chevron* decision itself disproves the first contention that summary judgment is always inappropriate. In *Chevron*, the Texas Supreme Court held *as a matter of law* that the physical impairment in question in that case, the plaintiff's vision problem, was not severe enough to merit protection under the Act.

The second contention is also not supported by the *Chevron* decision. Nothing in the court's opinion can be construed as limiting the analysis of the record on motion for summary judgment relative to a person's claim to handicap status under the Act to the severity issue. Moreover, the court's use of the word "generally" patently demonstrates that there are exceptions to the necessity of submitting the issue to the finder of fact. In Ms. Redmon's case, it was the clear lack of the severity of the physical impairment. In Hilton's case, it is the fact that the condition was neither a physiological nor a mental impairment and, as such, fell outside of the definition of "handicap" employed in the Act.

Interestingly, the Fifth Circuit also understood that Hilton's disabilities did not constitute a *severe* impairment of the kind intended to come under the protection of the Act. *Hilton*, 936 F.2d at 832. Thus, even if Hilton were correct in asserting that the *Chevron* decision limits summary judgments to cases raising the issue of the severity of the impairment, his argument that the Fifth Circuit failed to apply Texas law is again without merit.

Hilton's reliance on the decision in *Finney v. Baylor Medical Center Grapevine*, 792 S.W.2d 859 (Tex. App. – Ft.

Worth 1990, writ ref'd), is also misplaced. In *Finney*, the question on the defendant's motion for summary judgment was whether the plaintiff had a physical or mental impairment or an emotional condition. The plaintiff's condition was medically described as "Bipolar Affective Disorder (manic depression)." *Id.*, at 860. In that case, the court expressly found that the movant did not meet the standard for summary judgments under Texas practice. The court held that

> [t]he record contains no evidence which conclusively establishes that manic depression is specifically an "emotional" condition, nor does the record reflect the existence of the "physical," "emotional" and "mental" distinctions upon which Baylor bases its argument. Thus, the proper categorization of Finney's condition is a fact issue which remains undecided.

Finney, 792 S.W.2d at 860.

Under Texas law, the standard for summary judgment is stricter than under federal practice and the Texas courts do not follow the standard set forth in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *Casso v. Brand*, 776 S.W.2d 551, 555-556 (Tex. 1989)(ruling in *Celotex* expressly disallowed for motions for summary judgment under Texas procedure).[8] Under Texas procedure, the defendant

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[8] In *Gates v. Dow Chemical Co.*, 777 S.W.2d 120 (Tex. App. – Houston [14th Dist.]), *vacated, set aside, dism'd*, 783 S.W.2d 589 (Tex. 1989), the appellate court attempted to distinguish the holding in *Casso*; however, as the case was settled between the parties after the Texas Supreme Court granted an application for writ of error, it cannot be said with certainty that the appellate court was successful.

must actually establish that there exists no genuine issue of material fact and, unlike the *Celotex* standard, there is not a burden on the non-moving party to make a showing sufficient to establish the existence of an essential element of his case. *Celotex*, 477 U.S. at 322; *Casso*, 776 S.W.2d at 556. The court in *Finney* did not hold that the defendant was wrong in contending entitlement to summary judgment based on the argument that "emotional conditions" were not covered by the Act. Rather, the court held that the defendant did not establish with certainty that the plaintiff had an emotional condition, as opposed to a physical or mental condition.

The instant case was decided under federal procedure. Fed. R. Civ. P., Rule 56. No evidence was offered which showed that Hilton suffered from a severe physical impairment of the kind which would fall under the definition of "handicap" used in the Act. As such, the trial and appellate courts were correct in finding in favor of SWBT on its motion for summary judgment.

CONCLUSION

The record in this case establishes beyond dispute that the Fifth Circuit properly applied Texas law to the issues on appeal, that Hilton is not a handicapped person under the Act, and that Hilton's condition impaired his ability to reasonably perform the job in question. Given this record, Hilton's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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